SERVED: December 12, 1994

NTSB Order No. EA-4298

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 18th day of November, 1994

DAVID R. HINSON, Administrator, Federal Aviation Administration, Complainant, v. JAMES L. EVANS, Respondent.	Docket SE-13055

OPINION AND ORDER

Respondent has appealed from the oral initial decision of Administrative Law Judge William R. Mullins, issued on August 10, 1993, following an evidentiary hearing.[1] The law judge affirmed an order of the Administrator, on finding that respondent had violated 14 C.F.R. 91.13(a), 91.119(b), and 91.303(b) and (d).[2]

[1]The initial decision, an excerpt from the hearing transcript, is attached.

[2]§ 91.13(a) provides:

> No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another.

The law judge reduced the Administrator's 180-day proposed suspension of respondent's airman certificate to a suspension of 100 days. We deny the appeal.[3]

Respondent does not challenge any of the law judge's factual findings or ultimate legal conclusions. Instead, he makes two related, procedural arguments: first, that he was prejudiced by the Administrator's failure fully to comply with the law judge's pre-trial order; and, second, that the law judge's failure to enforce the pre-trial order resulted in prejudicial unfairness to respondent.

Law judge Mullins routinely issues a pre-trial order that states, in part, as follows:

> The Parties are advised that the following items are to be accomplished prior to trial. Failure to comply with this

(..continued)
§ 91.119(b) reads:

> Except when necessary for takeoff or landing, no person may operate an aircraft below the following altitudes:
>
> (b) Over congested areas. Over any congested area of a city, town, or settlement, or over any open air assembly of persons, an altitude of 1,000 feet above the highest obstacle within a horizontal radius of 2,000 feet of the aircraft.

At the time, § 91.303(b) and (d) read:

> No person may operate an aircraft in aerobatic flight -
>
> (b) Over an open air assembly of persons;
> * * * * *
> (d) Below an altitude of 1,500 feet above the surface[.]

The law judge dismissed charges that respondent also violated §§ 91.119(a) and 91.303(c).

[3]The Administrator has not appealed either the law judge's dismissal of two of the charges, or the reduction in sanction.

> Order, absent a showing of good cause, may result in sanction being imposed.
>
> * * *
>
> 2. The Parties are directed to exchange a list of their witnesses and a short statement as to what that witness will testify to not later than fifteen (15) days prior to trial.
>
> 3. The Parties are directed to exchange copies of all exhibits intended to be introduced at trial and those exhibits should be exchanged at least fifteen (15) days prior to trial . . . .

In addition, the Board's form letter, that was sent to respondent following his initial appeal of the Administrator's order, indicates that "discovery should be in accordance with the McClain case[.]"[4]

At the start of the hearing, respondent argued that the Administrator had failed to provide, as directed in the law judge's order, a list of witnesses, statements describing their testimony, or the exhibits he intended to present. The Administrator answered that he had provided respondent with (with the normal exceptions) a copy of the FAA's entire file.[5]

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[4]Administrator v. McClain, 1 NTSB 1542 (1972). In 1972, the Board's rules did not cover discovery. McClain established basic principles. We noted, among other things, that "there is little or no place in our proceedings for the element of surprise. The need . . . is to provide the parties with adequate information, so that they may make informed pleas, minimize surprise, expedite the proceedings, and meet the requirements of due process at all stages of the proceedings." Id. at 1544.

[5]The Administrator stated:

> As far as I know, he has every exhibit that we intend to offer. The statements of the witnesses are in the file. He knows exactly who the potential witnesses are. And the only witnesses that are here are those that are in the file that were already provided to him.

Respondent was not satisfied; he claimed that, because the Administrator provided only what he considered to be the "releasable" portion of the file, he did not comply with the law judge's pre-trial order.

The law judge concluded that the Administrator had substantially complied with his order. He further held that:

> if, at any time during the course of the hearing, there are any exhibits that they wish to offer or witnesses that you are unaware of that you were not advised of or their names were not contained in that file, then I will take your objections as to those exhibits and those witnesses . . . as they come up.

Tr. at 7.

At various times during the hearing, respondent objected to witness testimony and exhibits. His objections were overruled by the law judge in all but one instance.[6] We can find no error in those actions, and consider the law judge's approach to be a

(..continued)
Tr. at 6.

[6]See Tr. at 10. Respondent contended that the information provided him by the Administrator had not indicated that Ms. Sue Groff would be testifying. Although the Administrator pointed out that she was listed in the file as an FAA inspector, the law judge sustained respondent's objection to her appearance. Later in the hearing, the Administrator, via another FAA witness, introduced an exhibit containing Ms. Groff's name and signature. The law judge accepted that exhibit over respondent's objection. Although respondent cites that action as error because it allegedly allowed Ms. Groff to testify contrary to the law judge's earlier order, we disagree. The exhibit was a Statement of Aerobatic Competency that had been issued to respondent in 1992 by Ms. Groff as a General Aviation Operations Inspector. She signed it to certify the accuracy of the copy. Moreover, respondent shows no prejudice, as the exhibit merely reflected what respondent should himself have known: he was, by that statement, limited to aerobatics performed no lower than 250 feet.

reasonable and practical one in the circumstances.

McClain offered no hard and fast rules to apply as strictly as respondent would have it. The sufficiency of discovery responses is a matter committed to the discretion of our law judges (see 49 C.F.R. 821.19(b)), based on considerations of prejudice and general fairness. See, e.g., Administrator v. Wagner, NTSB Order EA-4081 (1994).[7] Further, law judge Mullins' order is not as rigid as respondent alleges. It provides that he "may" impose a sanction for failure to comply. Thus, even if he had found (which he did not) that the Administrator had not complied in good faith, respondent had no basis to assume that the case against him would be dismissed, the remedy he now seeks for the alleged procedural failings. We also find no error in the law judge's reasonable interpretation of his own order, i.e., that it did not apply to rebuttal exhibits. Tr. at 106.

We do not see (nor has respondent identified) any prejudice in the law judge's rulings. With the exception of Ms. Groff, whose testimony was precluded, respondent did not argue at the hearing, nor does he now argue, that he could not properly prepare for particular witnesses or exhibits because he had not

[7]The cases cited by respondent for the proposition that procedural defaults are not excused absent good cause are not on point. These cases relate only to certain types of filings. See Administrator v. Hooper, NTSB Order EA-2781 (1988), on remand from Hooper v. NTSB and FAA, 841 F.2d 1150 (D.C. Cir. 1988) (Board intends to adhere to policy requiring dismissal, absent showing of good cause, of all appeals in which timely notices of appeal, timely appeal briefs or timely extension requests have not been filed).

been advised of their existence. The purpose of McClain and discovery generally -- to "provide the parties with adequate information, so that they may make informed pleas, minimize surprise, expedite the proceedings, and meet the requirements of due process at all stages of the proceedings" -- was met in this case. That it was not done in the exact form respondent would like is not a persuasive reason either to dismiss the proceeding or reduce the sanction.

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied; and

2. The 100-day suspension of respondent's airman certificate shall begin 30 days from the date of service of this order.[8]

HALL, Chairman, LAUBER and HAMMERSCHMIDT, Members of the Board, concurred in the above opinion and order.

[8]For the purposes of this order, respondent must physically surrender his certificate to an appropriate representative of the FAA pursuant to FAR § 61.19(f).